STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 97B101

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JOE STITT,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
CANON MINIMUM CENTERS,

Respondent.

Hearing commenced on March 6, 1997 and concluded on September 26, 1997 before Administrative Law Judge Robert W. Thompson, Jr. Respondent appeared through Randall Henderson and was represented by Ceri Williams, Assistant Attorney General. Complainant appeared and was represented by Vaughn L. McClain, Attorney at Law.

Respondent called the following witnesses: Samuel Minnick, Maintenance Supervisor; Pete Pierce, Correctional Support Supervisor II; Ronny Jones, Internal Investigator; Peter Baca, Labor Gang Supervisor; Dale Aragon, Labor Gang Supervisor; Barry Wisner, Correctional Support Supervisor I; and Randall Henderson, Superintendent of Canon Minimum Centers, Colorado Department of Corrections.

Complainant testified on his own behalf and called three other witnesses: Joseph Michelli, M.D.; Richard Bell, M.D.; and James Vendetti, Correctional Support Supervisor.

Respondent's Exhibits 1 through 7 were stipulated into evidence. Exhibits 8, 9, 13 14 and 16 were admitted without objection. Exhibit 16 was sealed because it is a confidential document. Exhibits 10, 11 and 12 were admitted over objection.

Complainant's Exhibits A and G were admitted over objection. Exhibit B was not admitted.

MATTER APPEALED

Complainant appeals a disciplinary termination. For the reasons set forth below, respondent's action is affirmed.

ISSUES

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;

2. Whether the discipline imposed was within the range of alternatives available to the appointing authority;

3. Whether either party is entitled to an award of attorney fees and costs.

PRELIMINARY MATTERS

Complainant's motion to allow Dr. Michelli and Dr. Bell to testify by telephone from Colorado Springs was granted. Both witnesses testified as treating physicians and not as experts.

Respondent's witnesses Samuel Minnick and Don Davis were not allowed to testify to a past act by complainant under CRE 404(b).

Except for complainant and Randall Henderson, respondent's advisory witness, the witnesses were sequestered from the hearing room.

FINDINGS OF FACT

1. Complainant, Joe Stitt, was certified as a Correctional Support Supervisor I (Sergeant) with respondent the Department of Corrections (DOC) when he was dismissed on January 17, 1997.

2. Stitt was an inmate labor crew supervisor at the Canon Minimum Centers (CMC) in Canon City. He supervised six inmates on the work crew.

3. At approximately 11:45 a.m. on December 17, 1996, Stitt entered the labor shack, located away from the facility, to have lunch. Jerry Garcia, an inmate from another crew, was standing and looking at Stitt. Stitt asked the inmate who he was looking at. The inmate replied, "I'm looking at you." Telling Garcia to look somewhere else, Stitt lunged at the inmate and pushed him against the wall. Stitt grabbed Garcia by the throat, then used a headlock maneuver. He threw punches. Addressing Garcia, Stitt said, "Don't fuck with me ... I'll fuck you up." Garcia put his hands over his head in self-defense. He offered no resistance.

4. Garcia is between 5'4" and 5'6" tall. Stitt is 6"3" tall.

5. There were approximately six inmates in the room at the time of the incident.

6. Following the attack, Stitt said to Sgt. Peter Baca, Garcia's work supervisor, "That's how I handle a piece of shit." He told Baca that if he wanted to be a supervisor he needed to learn how to handle inmates, and that's how you handle them.

7. Stitt went to the office of his supervisor, Lt. Pete Pierce, in a state of frenzy. Upon entering the office, Stitt remarked that other supervisors might put up with this, but he wouldn't, and that he would "thump on the motherfucker's ass." He told Pierce that an inmate was staring at him and, "I'll bet he won't stare at me again ... I thumped on him."

8. Pierce called in the other two staff members who were present, Baca and Sgt. Dale Aragon, to discuss the incident. Garcia was brought in next. Pierce observed that the inmate was upset and had a swollen left eye, a red mark on his throat and a red mark on the right side of his face.

9. Garcia went back to work, but at around 3:00 Baca took him to the infirmary. Baca's observations were that Garcia had abrasions to his throat, a swollen lip and puffy left eye.

10. The day before, after Sgt. Barry Wisner had threatened Garcia with a write-up for failing to follow an order, Stitt told Wisner that inmates did not respect write-ups and that "pieces of shit" should not be allowed to talk back to officers.

11. Stitt, who had filed a worker's compensation claim for an on-the-job injury in 1993, is generally a tense and angry individual with a long history of depression and difficulty controlling his anger. His 1993 injury caused pain in his head and neck, which enhanced his propensity for anger. He possessed the capacity for overreacting to a given situation and for becoming explosive. He was released to return to work without restrictions but with advice from his physician to keep his anger under control.

12. Stitt does not have an organic or physical condition that would cause him to involuntarily lose control of his actions. He acknowledges that he has had a problem controlling his anger for many years. He was taking prozac, a medication for depression, during December 1996.

13. Stitt never presented himself to the agency as an individual with a disability under the Americans with Disabilities Act. He did not request any particular accommodation or assignment to help him control his anger in the workplace. His supervisor, Pierce, knew that he was taking prozac.

14. On January 13, 1997, CMC superintendent and delegated appointing authority Ronald Henderson held a predisciplinary meeting with Stitt. Stitt stated at the meeting that his medical condition affected what he did to the inmate.

15. DOC Administrative Regulation (AR) 300-16RD provides that physical force is never justifiable as punishment, and that physical force is justified as a last resort for the following reasons: "to prevent escapes, to effect an arrest of an offender, to subdue unruly inmates, to separate participants in fights, in self-defense and in defending staff, inmates or other persons, and to control inmates who fail to comply with lawful orders as defined by this Regulation and in accordance with appropriate statutory authority." (Exhibit 16.)

16. In reviewing Stitt's personnel file, Henderson took into consideration a 1995 letter of counseling Stitt had received from the facility superintendent pertaining to the making of verbal threats (Exhibit 12) and notations on past performance appraisals indicating a need to control his anger.

17. Henderson reviewed the investigative report (Exhibit 10)

together with the written statements of Stitt, Pierce, Baca and Aragon. He talked by telephone with Stitt's personal physician.

18. Henderson concluded that Stitt's conduct of December 17, 1996, causing injuries to an inmate without justification, violated the Staff Code of Conduct (Exhibit 9) and AR 300-16RD and was so egregious as to warrant immediate dismissal. In view of DOC's zero tolerance policy with respect to abusing inmates and concerns over the safety of staff as well as inmates, the appointing authority terminated complainant's employment effective January 17, 1997. (Exhibit 7.)

19. Complainant filed a timely appeal of the disciplinary action.

DISCUSSION

In this *de novo* disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warrants the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The State Personnel Board may reverse or modify respondent's action only if such action is found arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S. In determining whether an administrative agency's decision is arbitrary or capricious, the administrative law judge must determine whether a reasonable person, considering all the evidence in the record, would fairly and honestly be compelled to reach a different conclusion. *Ramseyer v. Colorado Department of Social Services*, 895 P.2d 506 (Colo. App. 1992).

The credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987). The fact finder is entitled to accept part's of a witness's testimony and reject other parts. *United States v. Cueto*, 628 F.2d 1273, 1275 (10th Cir. 1980). The fact finder can believe all, part, or none of a witness's testimony, even if uncontroverted. *In re Marriage of Bowles*, 916 P.2d 615, 617 (Colo. App. 1995).

It is the role of the administrative law judge to weigh the evidence and from the evidence reach a conclusion. The weight of the evidence is the relative value assigned to the credible evidence offered by a party to support a particular position. The weight of the evidence is not quantifiable in an absolute sense and is not a question of mathematics, but rather depends on its effect in inducing a belief. The preponderance of the evidence standard, as used in this administrative proceeding, requires the fact finder to be convinced that the factual conclusion he chooses is more likely than not. *See* Koch, *Administrative Law and Practice*, Vol. I at 491 (1985).

It is respondent's position that complainant's unjustified and excessive use of force against an inmate warrants immediate dismissal in view of the agency's zero tolerance policy vis-a-vis inmate abuse. Respondent contends that complainant had the ability to control himself but did not do so, rendering the misconduct willful, and that the agency does not have an obligation to accommodate abusive or threatening behavior on the part of an employee. Rather, according to respondent, DOC has a duty to protect inmates from brutality.

Complainant mounts a three-pronged attack on respondent's position. First, complainant submits that his medical, mental or psychological condition rendered him not accountable for his actions and, therefore, his conduct toward inmate Garcia was not willful. Second, he claims that his use of force against the inmate was justified. Third, he contends that his medical condition should have at least been a mitigating factor in the choice of discipline.

A preponderance of the credible evidence presented at hearing shows convincingly that complainant assaulted and caused injuries to inmate Garcia without provocation and without justification.

It is undisputed that complainant has a bad temper. Nevertheless, there is no organic reason, such as a brain dysfunction, that would cause him to involuntarily lash out at another person. He had been advised by DOC personnel as well as his own physician to keep his anger under control. He was knowledgeable of the agency policy prohibiting the use of force against inmates except under delineated circumstances.

There was testimony that inmates sometimes try to intimidate other inmates or DOC staff by staring them down. There is no credible evidence of that happening here. I specifically reject complainant's assertion that he stood silently for fifteen minutes eating his sandwich while Garcia stared at him as unreasonable, illogical and against the weight of the evidence. Complainant's contention that he gave Garcia a direct order before attacking him is likewise found incredible. Even when viewing the evidence in the light most favorable to the complainant, not required of the administrative law judge, there is absolutely no justification for his vicious attack on Garcia. None of the necessary elements of AR 300-16RD was apparent to justify the use of force.

Complainant's comments to other staff members are demonstrative of his personal opinion that correctional officers must be tough on inmates in order to gain their respect. He showed no regard for the potential of the violence of the incident escalating to the endangerment of other staff or inmates. His disdain for inmates is evident. His actions were knowing, voluntary and willful.

The appointing authority considered complainant's medical background and found no valid reason excusing the abusive treatment of Garcia. The same finding is made in this decision. Complainant's conduct was so flagrant and serious as to warrant immediate disciplinary action. The appointing authority did not abuse his discretion in terminating complainant's employment under the circumstances of this case. A reasonable person would not fairly and honestly be compelled to reach a different conclusion.

The findings required in order to assess attorney's fees cannot be made in this case. § 24-50-125.5, C.R.S.

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious or contrary to rule or law.

2. The discipline imposed was within the range of alternatives available to the appointing authority.

3. Neither party is entitled to an award of attorney fees and costs.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this 29 day of October, 1997, at Denver, Colorado.

Robert W. Thompson
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the 29 day of October, 1997, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Vaughn L. McClain
Attorney at Law
First National Bank Building
831 Royal Gorge Blvd., Suite 228
Canon City, CO 81212

and in the interagency mail, addressed as follows:

Ceri C. Williams
Assistant Attorney General
State Services Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is **$50.00**. Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11

inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.